APPENDIX A

Constitution of the United States, Article I—

Section 8 (Powers of Congress.)

1. The Congress shall have power:

* * *

3. To regulate commerce with foreign nations, and among the several States, and with the Indian tribes.

N.M.S.A., 1953 Comp., Section 72-16A-14.10—

Sec. 72-16A-14.10. Receipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States Constitution.

APPENDIX B

Filed: May 28, 1970

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 430

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Appellant,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Appellees.

DIRECT APPEAL

Kendall O. Schlenker
Schlenker & Parker, P. A.
Albuquerque, New Mexico
Gallagher & Walker
Albuquerque, New Mexico
Attorneys for Appellant
James A. Maloney
Attorney General
Richard J. Smith
Assistant Attorney General
Santa Fe, New Mexico
Attorneys for Appellees

Opinion

MAN, Judge.

This appeal was taken by appellant taxpayer from a ritten order of appellee Commissioner of Revenue, pur- uant to § 16-17-8(F), N.M.S.A. 1953 (Supp. 1969), and 72-13-39, N.M.S.A. 1953 (Repl. 10, pt. 2, Supp. 1969). he matter is before us on a stipulation of facts, and the ortions of this stipulation essential to a determination of ie issues presented under the points relied upon for re- ersal are:

"(1) Taxpayer, doing business as Evco Instructional Designs, is a New Mexico corporation, engaged in business as a designer or creator of instructional or educational programs. Its employees are principally writers, artists, draftsmen, production typists and administrators. Certain of the employees are skilled in originating and designing educational materials. Taxpayer is equipped and staffed to develop an educational idea all the way through to the finished product, which generally consists of reproducible originals of books, films, and magnetic audio tapes.

"(2) Taxpayer's principal office is at 235 San Pedro Drive, N.E., Albuquerque, New Mexico.

". . . .

"(6) Taxpayer's protest (to a tax assessment) is based upon the following contentions:

"(a) The assessment fails to recognize and allow exemptions from the Emergency School Tax for sales of tangible personal property to government agencies and exempt organizations for the period of time from January 1, 1966 to June 30, 1967, and such exemptions being allowed by Sec. 72-16-5, N.M.S.A. 1953 Comp.

"(b) The assessment fails to recognize and allow deductions in computing the Gross Receipts Tax for sales of tangible personal property to government agencies and exempt organizations for the period of time from July 1, 1967 to December 31, 1968, such deductions being provided by Sec. 72-16A-14 (G) and (L), N.M. S.A., 1953 Comp.

". . . .

"(e) The assessment is incorrect in that it attempts to impose a tax upon transactions which are exempt by virtue of their being in interstate commerce.

"(f) The assessment fails to recognize and allow deductions from the gross receipts tax for sales of tangible personal property in interstate commerce, contrary to Sec. 72-16A-14 (H) for the period to time from July 1, 1967 to December 31, 1968.

"(g) The same contentions and protests correctly apply to City of Albuquerque Municipal Sales Tax.

". . . .

"(9) It is agreed by the parties:

". . . .

"(g) B.I.A. [Bureau of Indian Affairs] Contract No. 14-20-0650-1808 resulted in gross receipts of $103,852.00. This contract was performed at Isleta Pueblo, New Mexico. The contract was for a computer-mediated instruction project. Taxpayer was required to identify conceptual deficits, identify and select relevant audio-visual materials, and produce a computer program

to mediate between the deficits and the audio-visual materials. Taxpayer produced a complete educational program, wrote a final report, concept dictionary, film concept analysis, and miscellaneous items suitable for reproduction and reuse. $12,875.00 of the contract amount is solely for services. Deductions have been allowed for equipment left on the job site.

"(h) Typical of all other contracts with government agencies and the one contract with an exempt organization is the Department of Agriculture (Forest Service) contract of January 19, 1967. Under this contract were produced:

Camera-ready copies:

Manual entitled "Orientation to the Training Course for Engineers in the Forest Service—Presentation Package" (78 pages, 8 1/2" X 11") "Self-Administered Questions and Referral Section" (16 pages, 8 1/2" X 11")

Programed textbook entitled "Technical Orientation to the Forest Service Division of Engineering" (334 pages, 8 1/2" X 11")

Programed notebook entitled "Technical Orientation to the Forest Service Division of Engineering" (35 pages, 8 1/2" X 11")

Manuals entitled "Instructor's Guide" (17 pages, 8 1/2" X 11"), "Instructor's Handbook" (15 pages, 8 1/2" X 11"), "Discussion Questions" (6 pages, 8 1/2" X 11"), "Programed Notebook" (108 pages, 8 1/2" X 11")

Programed notebook and textbook (unitone through unit five, part four) entitled "Technical Orientation to the Forest Service Trans-

portation System" (670 pages, 8 1/2" X 11")
Magnetic Audio Tape
195 Photographic color slides
Although this contract is typical, not all contracts require the production of all items required by this contract.

"(i) Typical of all contracts with clients and customers which are neither government agencies nor exempt organizations is the I.B.M. [International Business Machines] contract of July 11, 1968. Under this contract were produced:

Camera-ready copies:

Manuals entitled "IBM 50 Magnetic Data Inscriber (Audio Course) For Experienced Card Punch/Verifier Operators—Illustrations" (22 pages, 8 1/2" X 11"), "Operator's Guide" (14 pages, 8 1/2" X 11"). Miscellaneous attachments (8 pages, 8 1/2" X 11")
Script for magnetic audio tape (45 pages, 8 1/2" X 11") and tape from script.

"(j) All contracts with both government agencies and other clients and customers of taxpayer were negotiated and entered into outside the State of New Mexico and all camera-ready copies, filmstrips, photographic slides, and magnetic audio tapes were delivered outside the State of New Mexico. Actual performance of contracts where tangible personal property was produced was in New Mexico.

"(k) Although taxpayer has the capability to actually publish and print the books and manuals it creates, its contracts here involved re-

quired only the production of camera-ready copies from which its clients or customers publish the books and manuals. The same is true of film-strip, slides, and magnetic audio tapes, where the original only is produced. The reproducible originals were not resold by the contracting party to whom they were delivered."

The portions of the Commissioner's order with which the taxpayer disagrees, and the validity of which is to be determined on this appeal, are:

"1. Although camera-ready copies and other reproducible items are tangible personal property which was produced as a result of each of taxpayer's contracts, taxpayer's sales to government agencies and exempt organizations were not sales of tangible personal property exempt under the Emergency School Tax and deductible under the Gross Receipts Tax, since the tangible property was merely incidental to the performance of services.

". . . .

"3. Taxpayer's gross receipts are not from the sale of interstate commerce and therefore exempt from the Emergency School Tax or deductible in computing the Gross Receipts Tax.

"4. Taxpayer's gross receipts are not exempt nor deductible for purposes of the City of Albuquerque Municipal Sales Tax for the same reasons that they are not exempt or deductible for purposes of the Emergency School Tax and the Gross Receipts Tax."

It is conceded by the parties that the taxpayer is liable for the Albuquerque Municipal Sales Tax only if liable to the State for a sales tax, or emergency school tax and gross receipts tax, and for the same reasons. The

taxpayer has abandoned its Point 3, under which it contended its gross receipts from sales to retail dealers, wholesalers and manufacturers were exempt from the emergency school tax as provided by § 72-16-14, N.M.S.A. 1953 (Repealed effective July 1, 1967) and the gross receipts tax as provided by § 72-16A-14(A) and (B), N.M.S.A. 1953 (1966 Interim Supp.) (Repealed effective July 1, 1969). Thus, our decision on the first two points asserted by the taxpayer will dispose of all issues presented by the appeal.

Under the first point, the taxpayer contends the contracts, under which it furnished the reproducible originals of books, manuals, films and magnetic audio tapes to government agencies and exempt organizations, constituted sales of tangible personal property. The Commissioner disagreed and levied the assessment on the theory that the contracts were for services, although the camera-ready copies and other reproducible items were admittedly tangible personal property created and produced by the taxpayer pursuant to the contracts. Neither the statutes nor any of the Commissioner's regulations define or offer any specific aid in determining what is meant in the statutes by tangible personal property. We agree with the position of the taxpayer.

This is a question of first impression in this jurisdiction, but has been presented under varying forms of tax statutes and varying circumstances, with varying results, in many other jurisdictions. These varying results cannot be fully reconciled in principle.

The Commissioner first contends the taxpayer is seeking an exemption, exception or deduction from the tax laws, and that statutes should be reasonably but narrowly construed against tax exemptions, exceptions, or deductions. He cites in support of this position McKee v. Bureau of

Revenue, 63 N.M. 185, 315 P.2d 832 (1957); Flaska v. State, 51 N.M. 13, 177 P.2d 174 (1947); Peisker v. Unemployment Compensation Commission, 45 N.M. 307, 115 P.2d 62 (1941); Iden v. Bureau of Revenue, 43 N.M. 205, 89 P.2d 519 (1939). We agree with this principle of construction, but we also agree that taxing statutes should generally ". . . be given a fair, unbiased and reasonable construction, without favor either to the taxpayer or the state, to the end that the legislative intent is effectuated and the public interests to be subserved thereby furthered. . . ." Besser Company v. Bureau of Revenue, 74 N.M. 377, 394 P.2d 141 (1964).

Here, there is no question but what the agencies with which we are here concerned—agencies of the United States Government and the Research Foundation of the University of Toledo—are clearly exempt under the taxing statutes in question, and it has been so stipulated. The sole question is, therefore, whether or not the contracts between the taxpayer and these agencies for the creation, production and delivery of the reproducible originals of the books, manuals, films, magnetic audio tapes, and other items of tangible personal property constituted sales of tangible personal property, within the contemplation of the statutes, or were contracts for the performance of services, to which the items of tangible personal property were merely incidental.

The tax statutes in question clearly provided that sales of "tangible personal property" or the "selling of tangible personal property," to the agencies here involved should be exempt from the tax. The term "tangible personal property" is not defined in either Act, but, as already stated, it is admitted that the items in question were tangible personal property. There is also no question that the contracts required, as the ultimate acts of performance thereunder, the delivery to the agencies of these items of

tangible personal property. These items constituted the finished product contemplated by the contracts and were essential to the teaching, instructional and educational purposes for which they were intended. Their non-production, non-use or destruction would apparently defeat the ultimate objective of the entire contract under which they were created and furnished to the purchaser.

The fact that their value depended very largely upon the skills, learning, and technical abilities of the taxpayer, rather than the physical or tangible materials which went into their makeup, made them nonetheless tangible personal property subject to sale. See District of Columbia v. Norwood Studios, Inc., 336 F.2d 746 (D.C. Cir. 1964); Larey v. Dungan-Allen, Inc., 244 Ark. 908, 428 S.W.2d 71 (1968); Albers v. State Board of Equalization, 237 Cal. App.2d 494, 47 Cal.Rptr. 69 (1965), cert. denied, 383 U.S. 960, 86 S.Ct. 1226, 16 L.Ed.2d 302 (1966); People v. Grazer, 138 Cal.App.2d 274, 291 P.2d 957 (1965); Green v. Sgurovsky, 133 So.2d 663 (Fla. Ct. App. 1961); Community Telecasting Service v. Johnson, 220 A.2d 500 (Me. 1966); Mississippi State Tax Commission v. Hinton, 218 So.2d 740 (Miss. 1969); Hillman Periodicals, Inc. v. Gerosa, 285 App. Div. 441, 137 N.Y.S.2d 863, aff'd., 308 N.Y. 982, 127 N.E.2d 842 (1955); People ex rel. Walker Engraving Corporation v. Groves, 243 App.Div. 652, 276 N.Y.S. 674, aff'd., 268 N.Y. 648, 198 N.E. 539 (1935).

As above stated, the finished form of the items was essential to the use for which they were intended, and their great value to their purchasers, as the means of accomplishing the ultimate purposes of the contracts, depended on their existence in their finished form. Thus, as we view the principal objective of the agencies under their contracts, it was to secure from the taxpayer the finished items, and these finished items cannot logically be said to be

merely incidental to the performance of services. Clearly the purpose of the exemptions in the statutes was to exempt the United States, or any agency or instrumentality thereof, the State of New Mexico, or any subdivision thereof, non-profit schools, universities, hospitals, and religious or charitable organizations from the impact of the taxes in question. The adoption of the position taken by the Commissioner would result in the ultimate imposition of taxes, such as those here involved, upon the agencies and institutions which the Legislature clearly intended should be exempt therefrom, or result in the tax burden being shifted to other taxable customers of the taxpayer. Neither of these results would be consistent with the legislative intent. Shifting the tax burden would be inconsistent with the object of requiring a tax burden to fall with uniformity and equality upon the class of persons sought to be taxed. See New Mexico Electric Service Co. v. Jones, 80 N.M. 791, 461 P.2d 924 (Ct. App. 1969).

As already stated, we fully appreciate that other jurisdictions have taken what appears to be a position contrary in principle to that taken by us. For instance, see Bucyrus-Erie Company v. Lorenz, 26 Ill.2d 183, 186 N.E.2d 250 (1962). For a discussion and analysis of many of the cases dealing with the issues here presented, see Hellerstein, The Scope of the Taxable Sale Under Sales and Use Tax Acts: Sales as Distinguished From Services, 11 Tax Law Review 261, 261-288 (1955-56).

Under its second point, the taxpayer claims exemption from the taxes on its receipts under contracts with customers which were neither governmental agencies nor exempt institutions or organizations. As shown by the stipulated facts quoted above under Paragraph 9(i), the I.B.M. contract of July 11, 1968, is typical of these contracts, and the items of tangible personal property produced and de-

livered by the taxpayer to these customers, insofar as appears from the stipulation of facts, and insofar as material to the solution of the question now to be resolved, are similar to the items of tangible personal property considered under Point 1 above. Under Point 1, we held sales of similar tangible personal property to be exempt, because the statutes expressly provided for exemptions of such sales to the vendees there involved.

We are not here concerned with any such exemptions, and the fact that sales of tangible personal property were made under these contracts is not alone determinative of the issue now before us. The taxpayer claims exemption here upon the ground that the imposition of the taxes would constitute a tax upon interstate commerce. Paragraph 9(j) of the stipulation, as quoted, shows, and the taxpayer has so asserted in its brief in chief, that the contracts were negotiated and entered into outside the State of New Mexico, and the items of tangible personal property produced by the taxpayer pursuant to these contracts were delivered outside New Mexico. However, the actual performance of all work in the production of this property was accomplished by the taxpayer within New Mexico, where it maintains its principal office.

As we understand the stipulation relative to the assessment made by the Commissioner, and the briefs of the parties, the Commissioner seeks to assess taxes on the gross receipts of the taxpayer from these contracts. No effort has been made to apportion the overall services rendered and expenditures made in connection with negotiating and performing these contracts. Thus, we do not have a tax levied only on that portion of the gross receipts which can be attributed or allocated to the activities performed in New Mexico, as was the case in Bell Telephone Laboratories v. Bureau of Revenue, 78 N.M. 78, 428 P.2d 617 (1966), involving assessments under the Sales Tax,

or Emergency School Tax Act, which is one of the acts here involved.

As stated in the Bell Telephone Laboratories case, and in Dikewood Corporation v. Bureau of Revenue, 74 N.M. 75, 390 P.2d 661 (1964), this was a tax on the privilege of doing business in New Mexico. This tax act was repealed effective July 1, 1967, and was replaced by the Gross Receipts and Compensating Tax Act, which is the other act here involved. Sections 72-16A-1 to 19, N.M. S.A. 1953 (Repl. 10, pt. 2, Supp. 1969). The second section of this present act provides in part:

> "The purpose of the Gross Receipts and Compensating Tax Act [72-16A-1 to 72-16A-19] is to provide revenue for public purposes by levying a tax on the privilege of engaging in certain activities within New Mexico . . ."

There is no contention made by the taxpayer that its New Mexico activities fall outside the activities covered by the Act, except for the provision in § 72-16A-14.10 thereof that:

> "Receipts from transactions in interstate commerce may be deducted from gross receipts to the extent that the imposition of the gross receipts tax would be unlawful under the United States Constitution."

Regulations adopted by the Commissioner on September 22, 1967, relative to the applicability of this section of the Act, are of no assistance in determining the question before us. On December 5, 1969, a new regulation, interpreting the applicability of this section, was adopted and provides:

> "Receipts of New Mexico sellers from sales of property to non-residents of New Mexico where de-

livery is made out-of-state by seller's vehicle, U. S. Mail, or common carrier are receipts from transactions in interstate commerce and such receipts may be deducted from the gross receipts of the seller." G. R. Regulation 14.10-2.

It appears this interpretation of the statute would clearly exempt the gross receipts from the sales in question from the Gross Receipts and Compensating Tax Act, but we are not required to determine whether this regulation is an invalid attempt to negate § 72-16A-14.10, supra, because the regulation does not apply to the taxing period with which we are concerned.

The taxes here were imposed under both the Emergency School Tax Act, and the Gross Receipts and Compensating Tax Act, for the privilege of doing business in New Mexico. As stated in General Motors Corporation v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964), and quoted in Bell Telephone Laboratories v. Bureau of Revenue, supra:

"'. . . [I]t is well established that taxation measured by gross receipts is constitutionally proper if it is fairly apportioned.

"'A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. For our purposes the decisive issue turns on the operating incidence of the tax. In other words, the question is whether the State has exerted its power in proper proportion to appellant's activities within the State and to appellant's consequent enjoyment of the opportunities and protections which the State has afforded. . . .'"

As already stated, and as shown by the stipulation the taxpayer is a New Mexico corporation with its principal office in New Mexico, and the actual performance of all work in the production of the property provided for by the contracts here in question was accomplished within New Mexico. These in-state incidents are clearly sufficient as a basis for the levy by New Mexico of a gross receipts tax without doing violence to the interstate commerce clause of the federal constitution. See General Motors Corporation v. Washington, supra; Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602, 71 S.Ct. 508, 95 L.Ed. 573 (1951); Norton Co. v. Department of Revenue, 340 U.S. 534, 71 S.Ct. 377, 95 L.Ed. 517 (1951); Bell Telephone Laboratories v. Bureau of Revenue, supra.

As above stated, no effort has been made to impose the tax only upon that portion of the gross receipts which can be attributed to the activities performed within New Mexico. However, the taxpayer makes no complaint of this failure to apportion. Its position is that all of the gross receipts from the contracts under consideration are receipts from transactions in interstate commerce, that the imposition of the tax on any of these receipts is an unconstitutional burden on interstate commerce and that the taxpayer is, therefore, entitled to have all these gross receipts deducted, or exempt, from its taxable gross receipts, as provided in § 72-16A-14.10, supra. There is no showing in the record, and no argument is made, that there is a possibility of another state taxing, or attempting to tax, any receipts from, or activities incident to the performance of, these contracts. Thus, the question of multiple taxation, insofar as these contracts are concerned, is not before us, and, under these circumstances, the taxpayer has failed in its burden of showing an unconstitutional tax upon interstate commerce. See General Motors Corporation v. Washington, supra; Northwestern States

Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959); Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 64 S.Ct. 950, 88 L.Ed. 1283 (1944).

It follows from what has been said that the order of the Commission dated October 28, 1969, insofar as it sought to impose a tax on the sales, or receipts from the sales, of tangible personal property to government agencies and exempt organizations, and insofar as the same is inconsistent with this opinion, must be reversed. Otherwise, the order should be affirmed.

IT IS SO ORDERED.

s/ LaFel E. Oman
Judge

We Concur:
s/ Joe W. Wood, J.
s/ William R. Hendley, J.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Tuesday, August 4, 1970

No. 430

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Appellant,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Appellees.

DIRECT APPEAL

Final Order

This cause having heretofore been submitted and taken under advisement and an opinion of the Court having been handed down on the 28th day of May, 1970, and an application for Writ of Certiorari having been denied by the Supreme Court of the State of New Mexico on July 31, 1970:

IT IS, THEREFORE, ORDERED that the Order of the Court entered herein on the 28th day of May, 1970, reversing in part and affirming in part the judgment of the Commissioner of Revenue be and the same is hereby made final.

ATTEST: A true copy.

/s/ Hazel M. Chambers
Hazel M. Chambers, Clerk of the Court of Appeals of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Friday, July 31, 1970

No. 9096

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Respondent,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Petitioners.

Original Proceeding in Certiorari

This cause coming on before the Court for consideration on Petition for Writ of Certiorari directed to the Court of Appeals of the State of New Mexico, and the Court having considered said Petition and being sufficiently advised in the premises;

IT IS ORDERED that Petition for Writ of Certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the record in Court of Appeals Cause No. 430 be and the same is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A true copy.

/s/ Rose Marie Alderite
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. 9096

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Respondent.

Petition for Writ of Certiorari to the Court of Appeals of New Mexico

The Attorney General of the State of New Mexico, as attorney for the Bureau of Revenue of the State of New Mexico, petitioner herein, respectfully petitions this Court for a Writ of Certiorari, pursuant to Section 16-7-14, N.M.S.A., 1953 Compilation and Rule 29 of the Rules of the Supreme Court, and as grounds therefor states that:

1. The petitioner seeks to have reviewed the decision of the Court of Appeals of the State of New Mexico in Evco v. Jones, Court of Appeals No. 430, issued May 28, 1970, wherein Petitioner was Appellee and Respondent was the Appellant, being a direct appeal to the New Mexico Court of Appeals pursuant to the provisions of the Tax Administration Act.

2. Both the Petitioner and Respondent made a motion for rehearing which motions were denied on July 7, 1970.

3. This case involves issues of substantial public interest that should be determined by this Court for the following reasons:

A. The decision of the Court of Appeals holding what historically has been considered the sale of services to be a sale of tangible personal property will result in a significant loss of revenue to the State of New Mexico; and

B. The decision of the Court of Appeals holding the Bureau of Revenue may apportion receipts from the sale of tangible personal property may well result in very substantial losses of revenue to the State of New Mexico and may result in an unconstitutional burden on interstate commerce.

4. The decision of the Court of Appeals is erroneous in the following respects:

A. The New Mexico Court of Appeals erroneously held that the sale of services by the Respondent constituted the sale of tangible personal property.

B. The New Mexico Court of Appeals incorrectly stated the law relating to interstate taxation of the sale of tangible personal property and improperly concluded that apportionment is possible under the facts set forth in the record before the Court.

5. The facts material to the questions presented above are as follows:

A. Taxpayer, doing business as Evco Instructional Designs, is a New Mexico corporation, engaged in business as a designer or creator of instructional or educational programs. Its employees are principally writers, artists, draftsmen, production typists and administrators. Certain of the employees are skilled in originating and designing educational materials. Taxpayer is equipped and staffed

to develop an educational idea all the way through to the finished product, which generally consists of reproducible originals of books, films, and magnetic audio tapes.

B. The Bureau of Revenue assessed gross receipts tax on certain contracts of the Respondent believing that they constituted the sale of services.

C. The nature of the contracts is set forth in part on pages 2 through 4 of the Court of Appeals' decision which has been attached to this Petition and by reference is hereby incorporated and made a part hereof.

6. In its opinion the Court of Appeals has failed to consider numerous relevant statutory provisions and regulations in arriving at its conclusion that the sales involved should be considered as sales of tangible personal property rather than the sale of services under our tax laws. These statutory provisions and regulations are discussed in Point I of Appellee's Brief in Support of Motion for Rehearing which has been attached to this Petition.

7. As pointed out in Point I of Appellee's Brief in Support of Motion for Rehearing, the Court of Appeals has overlooked the fact that New Mexico is one of the few states in the United States which broadly taxes the sale of services through the imposition of a gross receipts tax. Decisions of other states relied on by the Court of Appeals interpreting what would normally be considered as a sale of services under our law, as a sale of materials under the laws of other states, are wholly inapplicable.

8. The Court of Appeals has failed to properly consider the New Mexico Supreme Court's decision in *Bell Telephone Laboratories* v. *Bureau of Revenue*, 78 N.M. 78, 428 P.2d 617 (1966).

10. The theory of the New Mexico gross receipts tax is to tax as broadly as possible the sale of services to all governmental agencies. The New Mexico Court of Appeals has incorrectly concluded in its opinion that the legislature "clearly" exempted the United States government from taxation. By so concluding, the Court of Appeals has jeopardized a large source of revenue to the State of New Mexico at a time when our demands for new revenues are ever increasing. The decision of the Court of Appeals, if allowed to stand by this Court, will have very serious adverse consequences on an already narrow tax base.

11. Although the Petitioner Bureau of Revenue has apparently "won" the second point (pages 8 through 12 of the Court of Appeals decision) it joined the Respondent in filing a motion for rehearing on this point before the Court of Appeals asserting that the Court of Appeals has improperly stated the law relating to the taxation of interstate sales of tangible personal property. It should be emphasized that both Petitioner and Respondent believe that the Court of Appeals has erroneously decided this issue.

12. This case involves a significant question of law under the Constitution of the United States. If the decision of the Court of Appeals is allowed to stand on the issue of taxation of interstate commerce the theory asserted would undoubtedly eventually result in an unconstitutional burden on interstate commerce and in addition will result in significant losses of revenue to the State of New Mexico.

WHEREFORE, Petitioner herein prays for a Writ of Certiorari reviewing said decision of the Court of Appeals of the State of New Mexico and vacating the same.

Petitioner further prays that this Court allow further oral argument on the issues involved in the Evco appeal, as set forth above, and to render its decision thereon and prays for such other relief as may be just in this case.

/s/ James A. Maloney
James A. Maloney
Attorney General
/s/ Gary O'Dowd
Gary O'Dowd
Deputy Attorney General

AFFIDAVIT

STATE OF NEW MEXICO)
) ss.
COUNTY OF SANTA FE)

Gary O'Dowd, being first duly sworn, on oath deposes and says that he is one of the attorneys for the Petitioner herein; that he has read the above and foregoing Petition for Writ of Certiorari; that the same is true to the best of his knowledge, information and belief, and that this Petition for Writ of Certiorari is not filed in this case for the purpose of delay, but that affiant believes that he has good cause for Certiorari.

/s/ Gary O'Dowd
Affiant

Subscribed and sworn to before me this 20th day of July, 1970.

/s/ Margaret Mae Sena
Notary Public
My Commission Expires: July 10, 1972.

IN THE COURT OF APPEALS OF
THE STATE OF NEW MEXICO

No. 430

EVCO, a New Mexico Corporation d/b/a EVCO
INSTRUCTIONAL DESIGNS,
Appellant,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO
Appellees.

Motion for Rehearing

Comes now the Appellees, by and through the Attorney General of the State of New Mexico, and request this Court that rehearing be granted by the Court for the following reasons:

1. That the Court of Appeals has incorrectly analyzed the purpose of the exemptions and deductions granted from gross receipts taxation to sales of tangible personal property to governmental agencies;

2. That the Court of Appeals has incorrectly stated the law as it concerns the apportionment of revenues, for taxation purposes, derived in part from sales in interstate commerce.

WHEREFORE, the Appellees respectfully pray that this Court grant a rehearing herein, and for such other relief as this Court may deem proper under the circumstances.

James A. Maloney
Attorney General
Richard J. Smith
Assistant Attorney General
Attorneys for Appellees

IN THE COURT OF APPEALS
STATE OF NEW MEXICO

No. 430

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Appellant,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Appellees.

Motion for Rehearing

EVCO, Appellant herein, respectfully moves the Court, pursuant to Rule 18 of the Rules of the Supreme Court and Court of Appeals, for a rehearing in this cause with respect only to the second issue on appeal, in which the Court decided that taxpayer's gross receipts from sales of tangible personal property to purchasers outside the State of New Mexico were neither exempt from the Emergency School Tax nor deductible in computing the Gross Receipts Tax as being in interstate commerce.

Appellant submits that the same is erroneous for the reason that the same does not take into account that the imposition in this case of the taxes sought to be imposed would be unconstitutional as imposing a multiple burden on interstate commerce, and that such burden is imposed as shown by the facts in this case.

Appellant shows the Court that this motion does not renew contentions previously argued and submitted.

Respectfully submitted,

EVCO, a New Mexico corporation,
/s/ Kendall O. Schlenker
Schlenker & Parker, P.A.
P. O. Box 925
Albuquerque, New Mexico 87103
Gallagher & Walker
Suite 1222
Bank of New Mexico Building
Albuquerque, New Mexico 87101
Attorneys for Appellant

UNITED STATES OF AMERICA SS:
THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable the Judges of the Court of Appeals of the State of New Mexico,

GREETINGS:

WHEREAS, lately in the Court of Appeals of the State of New Mexico, there came before you a cause between EVCO, a New Mexico Corporation, d/b/a EVCO Instructional Designs, appellant, and Franklin Jones, Commissioner of the Bureau of Revenue of the State of New Mexico and The Bureau of Revenue of the State of New Mexico, appellees, No. 430, wherein the judgment of the said Court of Appeals was duly entered on the twenty-eighth day of May A. D. 1970, as appears by an inspection of the petition for writ of certiorari and response thereto, which was brought into the SUPREME COURT OF THE UNITED STATES by virtue of a writ of certiorari as provided by act of Congress.

AND WHEREAS, in the October Term, 1970, the said cause came on to be heard before the SUPREME COURT OF THE UNITED STATES on the petition for writ of certiorari and the response thereto:

ON CONSIDERATION WHEREOF, it was ordered and adjudged on May 17, 1971, by this Court that the judgment of the said Court of Appeals be vacated with costs, and that this cause be remanded to the Court of Appeals of the State of New Mexico for reconsideration in light of the position asserted by the Attorney General in the brief in opposition.

IT WAS FURTHER ORDERED that Evco dba Evco Instructional Designs, recover from Franklin Jones, Commissioner of the Bureau of Revenue of the State of New Mexico, One Hundred Dollars ($100) for their costs herein expended.

NOW, THEREFORE, THE CAUSE IS REMANDED to you in order that such proceedings may be had in the said cause, in conformity with the judgment of this Court above stated, as accord with right and justice, and the Constitution and laws of the United States, the said writ notwithstanding.

Witness, the Honorable WARREN E. BURGER, Chief Justice of the United States, the sixteenth - - - - - day of June - - - - - in the year of our Lord one thousand nine hundred and seventy-one.

Costs of Evco dba Evco Instructional Designs:

Clerk's costs $100

/s/ E. Robert Seaver
Clerk of the Supreme Court
of the United States

No. 928

October Term, 1970
Evco dba Evco Instructional Designs,

v

Franklin Jones, Commissioner of the Bureau of Revenue of the State of New Mexico

(Filed June 21, 1971)

Filed: July 30, 1971

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

No. 430

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Appellant,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Appellees.

DIRECT APPEAL

Kendall O. Schlenker
Schlenker & Parker, P. A.
Albuquerque, New Mexico
Gallagher & Walker
Albuquerque, New Mexico
Attorneys for Appellant
James A. Maloney
Attorney General
Richard J. Smith
Asst. Atty. Gen.
Santa Fe, New Mexico
Attorneys for Appellees

Opinion

OMAN, Justice.

The original opinion by this court in this cause appears in Evco v. Jones, 81 N.M. 724, 472 P.2d 987 (Ct. App. 1970). As shown by that opinion, two points were presented to this court for consideration and decision. The second of these points is the one with which we are primarily concerned, and our reconsideration thereof has

been occasioned by the following order entered on May 17, 1971 by the Supreme Court of the United States:

> "In view of the concessions made in the brief in opposition filed by the Attorney General of New Mexico, and on examination of the record, the petition for a writ of certiorari is granted, the judgment is vacated and the case is remanded to the Court of Appeals of the State of New Mexico for reconsideration in the light of the position asserted by the Attorney General in the brief in opposition. The Chief Justice, Mr. Justice Black, Mr. Justice Harlan, Mr. Justice Stewart are of the opinion that certiorari should be denied."

The following positions were taken by the Attorney General in its said brief in opposition and in oral argument before this court upon rehearing after the remand: (1) because we concluded in our original opinion that the contracts, under which the taxpayer created and furnished reproducible originals of books, manuals, films and magnetic audio tapes to out-of-state purchasers, constituted sales of tangible personal property, rather than contracts for services as contended by the Commissioner, the in-state incidents, or the New Mexico activities of the taxpayer in the performance of these contracts, could not be taxed under the New Mexico Gross Receipts Tax without doing violence to the interstate commerce clause of the Federal Constitution; and (2) because of our determination that these contracts constituted sales, rather than contracts for services, the administrative burdens in apportioning receipts from these contracts are made "immensely more difficult."

A resolution of the question, as to whether the State has exerted its power in proper proportion to the taxpayer's activities within the State and to its consequent enjoyment of the opportunities and protection which the

State has afforded, should not be dependent upon whether the contract under which the activities are performed is a contract of sale or a contract for services. The State may properly exact a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. General Motors Corporation v. Washington, 377 U.S. 436, 84 S.Ct. 1564, 12 L.Ed.2d 430 (1964); Bell Telephone Laboratories v. Bureau of Revenue, 78 N.M. 78, 428 P.2d 617 (1966). We fail to understand how a tax on this aspect of interstate commerce can be constitutionally fair and valid if the incidents arise out of a contract for services, but constitutionally unfair and invalid when these same incidents arise out of a contract of sale.

In our opinion taxable incidents are equally apparent and are ascertainable with equal ease whether they arise out of a contract of sale or out of a contract for services. In any event, the relative ease of ascertainment of taxable incidents should not be the primary consideration in determining the validity or invalidity of a tax law.

As pointed out in our prior opinion, there is no question of apportionment in this case, because no question of multiple taxation is involved. The burden of showing the unconstitutionality of a tax upon interstate commerce rests upon the taxpayer. General Motors Corporation v. Washington, supra. In this the taxpayer failed.

We reinstate and reaffirm our opinion in Evco v. Jones, supra.

IT IS SO ORDERED.

/s/ LaFel E. Oman
Justice, Supreme Court

WE CONCUR:

/s/ Joe W. Wood C.J.

/s/ William R. Hendley J.

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Wednesday, September 29, 1971

No. 430

EVCO, a New Mexico Corporation, dba EVCO INSTRUCTIONAL DESIGNS,
Appellant,

v.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO AND THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Appellees.

DIRECT APPEAL

Final Order

This cause having heretofore been submitted and taken under advisement and an opinion of the Court having been handed down on the 30th day of July, 1971, motion for rehearing having been denied, and application for writ of certiorari having been denied,

IT IS, THEREFORE, ORDERED that the Order of the Court of Appeals entered herein on the 30th day of July, 1971, reinstating and reaffirming the opinion of this Court filed on May 28, 1971, in EVCO v. JONES, 81 N.M. 724, 472 P.2d 987, and remanding said cause to the Commissioner of the New Mexico Bureau of Revenue for such further proceedings as may be proper, if any, consistent and in

conformity with said opinion, be and the same is hereby made final.

cc: Schlenker & Parker
cc: Gallagher & Walker
cc: Attorney General

Attest: A true copy.

/s/ Hazel M. Davis
Clerk of the Court of Appeals of the State of New Mexico.

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

Wednesday, September 29, 1971

No. 9322

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, et al.,
Respondents.

Original Proceeding in Certiorari

This cause coming on before the Court for consideration on Petition for Writ of Certiorari directed to the Court of Appeals of the State of New Mexico, and the Court having considered said Petition and being sufficiently advised in the premises;

IT IS ORDERED that Petition for Writ of Certiorari be and the same is hereby denied.

IT IS FURTHER ORDERED that the record in Court of Appeals Cause No. 430 be and the same is hereby returned to the Clerk of the Court of Appeals.

Attest: True Copy

/s/ Rose Marie Alderite
Clerk of the Supreme Court
of the State of New Mexico

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. .....

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Petitioner,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Respondents.

Application for Writ of Certiorari to the Court of Appeals of New Mexico

EVCO, by its attorneys, respectfully applies and petitions this Court for a Writ of Certiorari, pursuant to Sec. 16-7-14, N.M.S.A., 1953 Comp. and Rule 29 of the Rules of the Supreme Court, and as the grounds therefor states:

1. The petitioner seeks to have reviewed the decision of the Court of Appeals of the State of New Mexico in Evco v. Jones, Court of Appeals No. 430, issued July 30, 1971. Petitioner's Motion for Rehearing was denied August 24, 1971.

2. This is the second time the question presented for review has been before this Court upon Petition for Application for Writ of Certiorari.

Upon a direct appeal to the New Mexico Court of Appeals pursuant to the Tax Administration Act, the Court of Appeals issued its decision on May 28, 1970. Both petitioner and respondents filed Motions for Rehearing, which were both denied on July 7, 1970. Both parties then filed Petitions for Writ of Certiorari, which were denied by this Court on July 31, 1970. (No. 9096).

Petitioner then filed its Petition for Writ of Certiorari in the Supreme Court of the United States. This Petition was granted, resulting in reconsideration by the Court of Appeals and the decision, Motion for Rehearing and the denial thereof, all referred to above.

3. The question presented for review is:

Whether taxpayer's gross receipts from sales to customers other than government agencies and nonprofit organizations were exempt from the emergency school tax and deductible in computing the gross receipts tax as being in interstate commerce.

4. The facts material to the question presented have been fully developed by Stipulation of the parties and by the prior decisions of the Court of Appeals. Essentially, petitioner produces or creates tangible personal property which it sells to customers outside the State of New Mexico, and which are delivered to such customers outside the State of New Mexico.

5. Petitioner asserts that if the receipts from such property were not exempt from the emergency school tax, and were not deductible in computing the gross receipts tax, such taxes impose an unconstitutional burden on interstate commerce.

6. The question was presented to the Court of Appeals as Point II in Appellant's Brief-in-Chief, page 22, on the direct appeal. It was also presented in all subsequent pleadings and hearings in the New Mexico Court of Appeals, the New Mexico Supreme Court, and the Supreme Court of the United States.

WHEREFORE, petitioner prays for the grant of a Writ of Certiorari reviewing said decision of the Court of Appeals of the State of New Mexico and vacating the same with respect to the question herein presented.

Respectfully submitted,

EVCO, a New Mexico corporation
Schlenker & Parker, P.A.
P. O. Box 925
Albuquerque, New Mexico 87103
Gallagher & Walker
Suite 1222, Bank of New Mexico Building
Albuquerque, New Mexico 87101
Attorneys for Petitioner

IN THE COURT OF APPEALS
STATE OF NEW MEXICO

No. 430

EVCO, a New Mexico Corporation, d/b/a
EVCO INSTRUCTIONAL DESIGNS,
Appellant,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Appellees.

Motion for Rehearing

EVCO, Appellant herein, respectfully moves the Court pursuant to Rule 18 of the Rules of the Supreme Court and Court of Appeals, for a rehearing in this cause with respect only to the second issue on appeal, in which the Court decided that taxpayer's gross receipts from sales of tangible personal property to purchasers outside the State of New Mexico were neither exempt from the Emergency School Tax nor deductible in computing the Gross Receipts Tax as being in interstate commerce.

Appellant submits that the same is erroneous for the reason that the same does not take into account that the imposition in this case of the taxes sought to be imposed would be unconstitutional as imposing a multiple burden on interstate commerce, and that such burden is imposed as shown by the facts in this case.

Appellant shows the Court that this motion does not renew contentions previously argued and submitted.

Respectfully submitted,

EVCO, a New Mexico corporation,
/s/ Kendall O. Schlenker
Schlenker & Parker, P.A.
P. O. Box 925
Albuquerque, New Mexico 87103
Gallagher & Walker
Suite 1222
Bank of New Mexico Building
Albuquerque, New Mexico 87101
Attorneys for Appellant

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

Tuesday, August 24, 1971

No. 430

EVCO, a New Mexico Corporation, d/b/a EVCO INSTRUCTIONAL DESIGNS,
Appellant,

vs.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO and THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO,
Appellees.

DIRECT APPEAL

This cause coming on for hearing upon Appellant's motion for a rehearing, and the Court having considered said motion and briefs of counsel, and being now sufficiently advised in the premises,

IT IS ORDERED that said motion for rehearing be and the same is hereby denied.

ATTEST: A true copy.

/s/ Hazel M. Davis
Clerk of the Court of Appeals
of the State of New Mexico